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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JOSEPH CHASE et al.,

Plaintiffs and Respondents,

v.

BENJAMIN WIZMANN et al.,

Defendants and Appellants.

B290131

(Los Angeles County
Super. Ct. No. BC647861)

APPEAL from an order of the Superior Court of
Los Angeles County. Dalila Lyons, Judge. Affirmed.

Walk Free Law and Alana Yakovlev; Kosnett Law Firm
and Louis Kosnett for Defendants and Appellants.

Fischbach & Fischbach and Joseph S. Fischbach; Koletsky,
Mancini, Feldman and Morrow and Robert D. Goldberg; Sylvia E.
Chase for Plaintiffs and Respondents.

Defendants and appellants Benjamin Wizmann, Michelle Wizmann,¹ Mount Management, Inc., and Caroline Denise Wizmann (collectively, defendants) appeal from the order denying their motion to disqualify the law firm of Fischbach & Fischbach (Fischbach) and attorney Sylvia Chase (Chase), counsel for plaintiffs Joseph Chase and Sylvia Chase² (collectively, plaintiffs) in this action for trespass and other claims. We affirm the trial court's order.

BACKGROUND

The current lawsuit

Plaintiffs and defendants are neighbors. Plaintiffs own and reside in a home on Mount Olympus Drive in Los Angeles. The Wizmann defendants own the residential property immediately adjacent to plaintiffs' home.

On January 23, 2017, plaintiffs sued the Wizmann defendants for trespass, trespass to timber, nuisance, removal of lateral and subjacent support, negligence, and fraudulent transfer. A first amended complaint, filed on February 7, 2018, added the other two defendants.

Plaintiffs allege that in 2013, defendants began a significant renovation of defendants' property, which included excavation of an existing slope between the parties' respective properties, expansion of a pool, and installation of a retaining wall and several pieces of mechanical equipment. Plaintiffs allege that this work was done without required permits or engineering calculations, making it illegal and dangerous. Plaintiffs further allege that in 2015, defendants and their agents trespassed onto plaintiffs' property and damaged or destroyed fixtures and chattels, including cypress trees, a fence, a sprinkler

¹ Benjamin Wizmann and Michelle Wizmann are sometimes referred to collectively as the Wizmann defendants. Michelle Wizmann is referred to individually as Wizmann.

² Chase is both a plaintiff and counsel for the plaintiffs in this action.

system, and stucco on plaintiffs' home. Plaintiffs allege that defendants and their agents routinely leave garbage, tools, and materials on plaintiffs' property and have caused significant damage, including erosion from their yard. Plaintiffs also allege that short-term renters of defendants' property have trespassed onto plaintiffs' property while under the influence of drugs or alcohol and have damaged plaintiffs' landscaping and fixtures.

Chase associated as co-counsel for plaintiffs in this action on October 11, 2017.

Chase's representation of Wizmann

Wizmann was injured in an automobile accident in 2016. She retained Chase to represent her in the personal injury action concerning that accident by signing a retainer agreement dated June 30, 2016.

From February 2017 to June 2017, Chase attempted to communicate with Wizmann, by email and by U.S. mail, about the personal injury action, but Wizmann did not respond. On June 21, 2017, Chase received a response to a February 8, 2017 letter she had sent to Wizmann regarding an offer to settle the personal injury action. Wizmann's response indicated she was rejecting the settlement offer. On June 26, 2017, Chase mailed a letter to Wizmann terminating her representation in the personal injury action.

Motion to disqualify

On March 20, 2018, defendants filed a motion to disqualify Chase and Fischbach, arguing that automatic disqualification was warranted because of an incurable conflict of interest, violation of former rules 3-310 and 3-700(B)(2) of the California Rules of Professional Conduct,³ and violation of common law

³ Further references to rules are to the State Bar Rules of Professional Conduct. Under new rules adopted by the Board of Trustees of the State Bar in September 2018 and approved by the Supreme Court and effective November 1, 2018, former rule 3-310(C) has been renumbered as rule 1.2. (*Jarvis v. Jarvis* (2019) 33 Cal.App.5th 113, 134, fn. 7 (*Jarvis*).)

duties of loyalty and confidentiality. Defendants claimed Chase had obtained material confidential information from Wizmann in the summer of 2017 concerning income from defendants' short-term rental of their property on Airbnb and that Chase's conflict of interest should be imputed to Fischbach.

Plaintiffs opposed the motion, arguing that the current action and the personal injury action in which Chase had represented Wizmann were wholly unrelated, that Chase had ceased representing Wizmann in the personal injury action, and that the only confidences Chase obtained in the personal injury action concerned Wizmann's injuries and the events leading up to them.

The trial court denied defendants' motion, finding no substantial relationship between Chase's representation of Wizmann in the personal injury action and her representation of plaintiffs in the current action. The court also found insufficient evidence that Chase divulged confidential information from her prior representation of Wizmann or that Chase had simultaneously represented both Wizmann and plaintiffs. The trial court denied the motion to disqualify without prejudice, noting that defendants could refile the motion if they obtained evidence that Chase had divulged confidential information.

This appeal followed.

DISCUSSION

I. Standard of review

"An order on a motion to disqualify counsel is directly appealable. [Citation.]" (*Lynn v. George* (2017) 15 Cal.App.5th 630, 633, fn. 1.) A trial court's decision on a disqualification motion is generally reviewed for abuse of discretion. (*In re*

Former rule 3-700(B)(2) requires an attorney to withdraw from a representation if "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act" (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1132.)

Charlisse C. (2008) 45 Cal.4th 145, 159.) “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’ [Citation.] ‘As to disputed factual issues, a reviewing court’s role is simply to determine whether substantial evidence supports the trial court’s findings of fact. . . [Citations.]” (*Jarvis, supra*, 33 Cal.App.5th at pp. 128-129.) When substantial evidence supports the trial court’s factual findings, an appellate court reviews conclusions based on those findings for abuse of discretion. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*Speedee*).

II. Applicable legal principles

“A trial court’s authority to disqualify an attorney derives from the power inherent in every court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.’ [Citations.]” (*Speedee, supra*, 20 Cal.4th at p. 1145.) That authority is often exercised upon a showing that disqualification is required under professional standards governing avoidance of conflicts of interest or potential adverse use of confidential information. (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 303.)

Conflicts of interest can arise in two contexts: (1) when an attorney’s potentially conflicting representations are simultaneous, and (2) when the potential conflict arises from the successive representation of clients with potentially adverse interests. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283, 284 (*Flatt*).

“In simultaneous representation cases, “[t]he primary value at stake . . . is the attorney’s duty -- and the client’s legitimate expectation -- of loyalty, rather than confidentiality.” [Citation.] Because a conflict involving an attorney’s duty of

loyalty is “[t]he most egregious” kind of conflict, the disqualification standards [the Supreme Court has] developed for simultaneous representation cases are “more stringent” than those that apply in successive representation cases; “[w]ith few exceptions, disqualification [in a case of simultaneous representation] follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other. [Citation.]” [Citation.]’ [Citation.]” (*Jarvis, supra*, 33 Cal.App.5th at p. 130.)

When the potential conflict arises from an attorney’s successive representation of clients with potentially adverse interests, the primary fiduciary value at risk is that of client confidentiality. (*Flatt, supra*, 9 Cal.4th at p. 283.) Courts do not generally inquire into whether the attorney possesses confidential information. (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331 (*Adams*).) Instead, a “substantial relationship” test is applied to determine whether attorney disqualification is warranted. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 713 (*Jessen*).)

Under the substantial relationship test, attorney disqualification turns on two variables: (1) the relationship between the subjects of the former and current representations, and (2) the relationship between the attorney and the former client involved in the prior representation. (*Jessen, supra*, 111 Cal.App.4th at p. 709.) “If the relationship between the attorney and the former client is shown to have been direct -- that is, where the lawyer was personally involved in providing legal advice and services to the former client -- then it must be presumed that confidential information has passed to the attorney and there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship.” (*Ibid.*) In such cases, disqualification will depend on whether the subjects of the current and prior representations are linked in some

rational manner. (*Flatt, supra*, 9 Cal.4th at p. 283; *Jessen*, at p. 711.)

The “subject” of a representation includes “information material to the evaluation, prosecution, settlement or accomplishment of the litigation or transaction given its specific legal and factual issues. Thus, successive representations will be ‘substantially related’ when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues. [Citations.]” (*Jessen, supra*, 111 Cal.App.4th at p. 713.)

The foregoing principles are codified in the Rules of Professional Conduct. Former rule 3-310(C) applies to simultaneous representation of clients with potentially conflicting interests. It provides in relevant part: “A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.” (former rule 3-310(C); *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 728.)

Former rule 3-310(E) applies to both concurrent and successive representations. It provides that an attorney “shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.” (former rule 3-310(E); *Adams, supra*, 86 Cal.App.4th at p. 1331.)

III. No abuse of discretion

The record discloses no abuse of discretion by the trial court. In denying the motion to disqualify, the trial court

resolved disputed factual issues as to whether Chase concurrently represented Wizmann and plaintiffs, whether there was a substantial relationship between Chase's representation of Wizmann in the personal injury action and her representation of plaintiffs in this action, and whether Chase disclosed confidential information she obtained while representing Wizmann in the personal injury action. Substantial evidence supports those findings.

IV. No concurrent representation

Substantial evidence supports the trial court's finding that Chase did not simultaneously represent Wizmann and plaintiffs. Chase terminated her representation of Wizmann in a letter mailed to Wizmann on June 26, 2017, and Chase did not associate as co-counsel in this case until October 11, 2017. Because there was no concurrent representation, former rule 3-310(C) does not apply.

Defendants' argument that Chase acted as counsel for plaintiffs at an October 11, 2017 deposition and "may have been responsible for propounding" discovery to defendants "as far back as July 2017" does not establish concurrent representation or any violation of rule 3-310(C). The evidence shows that Chase terminated her representation of Wizmann in the prior personal injury action in June 2017.

V. No substantial relationship between current and former representations

Substantial evidence also supports the trial court's finding that no substantial relationship exists between Chase's prior representation of Wizmann in the personal injury action and her representation of plaintiffs in the current action.

Although Chase's relationship with Wizmann in the prior personal injury action was direct, and it is therefore presumed that Chase obtained confidential information in connection with that action (*Jessen, supra*, 111 Cal.App.4th at p. 709), there is substantial evidence to support the trial court's finding that the subjects of the prior and current representations are wholly unrelated. The prior action concerned injuries Wizmann

sustained in an automobile accident. The current action is one for trespass, nuisance, and claims for property damage by defendants and their contractors and tenants. Defendants cite no evidence that would support a rational conclusion that information material to the evaluation, prosecution, or settlement of the personal injury action is also material to the evaluation, prosecution, or settlement of the current action or any violation of rule 3-310(E). (*Jessen*, at p. 713.)

We reject defendants' argument that Chase divulged client confidences obtained in her prior representation of Wizmann by propounding discovery in the current action seeking disclosure of information that could only have been obtained in the prior personal injury action. Plaintiffs' discovery requests sought documents related to defendants' short-term rental of their property, including rental agreements and monthly returns filed with the office of finance and transient occupancy taxes of the City of Los Angeles. As the trial court noted in its written ruling, that defendants were renting their property is not necessarily confidential information. Any neighbor, including plaintiffs, could obtain that information by observing short-term tenants coming and going from defendants' property. Plaintiffs' fifth cause of action for nuisance is premised on the conduct of those short-term tenants.

The trial court did not abuse its discretion by denying defendants' motion to disqualify Chase and her co-counsel Fischbach.

DISPOSITION

The order denying the motion to disqualify is affirmed.
Plaintiffs are awarded their costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
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